



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 53 OF 2019

JOHN GITAU MUHIAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (by Hon. Caroline, RM), dated 11th April 2019 in Criminal Case No. 15 of 2018 in the Senior Magistrate's Court at Loitokitok)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with (2) of the Sexual Offences Act, No. 3 of 2006. Particulars of the offence were that on the 26th day of September, 2018 at [particulars withheld] village in Loitokitok Sub-County within Kajiado County, he intentionally and unlawfully caused his male organ to penetrate the female organ of MN, a child aged one year 6 months.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars being that on the same day at [particulars withheld] village in Loitokitok Sub-County within Kajiado County, he intentionally touched the private parts of MN, a child aged one year 6 months.

3. The appellant denied the charges and after trial in which the Prosecution called 5 witnesses and the appellant's defence, he was convicted and sentenced to life imprisonment. He was aggrieved with both conviction and sentence and filed this appeal raising the following grounds, namely:

1. ***THAT***, the learned trial magistrate erred in law and facts in finding that he was properly identified as the perpetrator of the offence as required in law.

2. ***THAT***, the learned trial magistrate erred in law and facts in failing to find that the key prosecution witnesses were evidently coerced to implicate him and whose testimonies cannot be trusted.

3. ***THAT***, the learned trial magistrate erred in law and facts when he refuted his defence without giving clear points of determination.

4. ***THAT***, the learned trial magistrate erred in law and facts in failing to find that essential prosecution witnesses to prove basic facts were not produced.

5. ***THAT***, the trial magistrate erred in law and fact by failing to consider his defence statement which portrayed an alibi and grudges between him and the key prosecution witnesses.

4. The appellant filed supplementary grounds of appeal together with submissions raising the following grounds, namely:

1. ***The learned trial magistrate erred in law and in fact in convicting the appellant in a flawed trial in vitiating his constitutional right to information as provided in Article. 50 (2) (g), (h), (i) & (k).***

2. ***The learned trial magistrate erred in law and in fact in convicting the appellant by failing to subject him to a fair trial as required under Articles 25 (c); 50 (2) (c) & (i) of the Constitution.***

3. ***The learned trial magistrate erred in law and in fact by convicting the appellant on wrong stipulated Procedure of plea- taking as per Art. 50 (1) & (2) (b) of the Constitution.***

4. ***The learned trial magistrate faulted in law and in fact in convicting the appellant by shifting the burden of proof to the appellant herein which led to a breach of law on burden and standard of proof.***
5. ***The life sentence imposed upon the appellant is harsh, excessive and unjust thus it does not achieve the objectives intended in the Sexual Offences Act.***
6. ***The learned trial magistrate erred in law and fact when she relied on the evidence of hostile and unreliable witnesses.***
7. ***The learned trial magistrate erred in law and in fact in convicting him on evidence where penile penetration was not scientifically, exhaustively and conclusively proved.***
8. ***The learned trial magistrate erred in law and in fact in admitting the evidence of children who can be manipulated.***
9. ***The learned trial magistrate erred in law and in fact in convicting him on flawed proceedings with glaring contradictions and conflicts on a case which was not proved beyond reasonable doubt.***
10. ***The trial court erred in law and fact when it failed to comply with section 208 of the CPC which entails the accused fundamental right to cross-examine all the witnesses to gauge the veracity of the evidence given.***
11. ***The appellant's defence statement was not properly considered in light of section 169(1) of the Criminal Procedure Code.***
12. ***The learned trial magistrate erred in law and facts in failing to note that once a charge sheet is defective the entire proceeding that follow from it is rendered null and void and is not curable under Section. 382 of the CPC.***

5. During the hearing of the appeal, the appellant relied on his grounds of appeal and written submissions. He submitted that the prosecution bears the burden of proof and relied on ***Woolmington v DPP*** (1935) A.C 462. The appellant argued that his right to information guaranteed under Article 50 (2) (g) (h) (j) (k) of the Constitution was infringed in that he was not supplied with the documents relied on by the prosecution during trial. He relied on ***Daniel Chege Magotho v Republic***, (2014) eKLR and ***Francis Muniu Kariuki v Republic*** [2017] eKLR. He therefore argued that non-disclosure of documents rendered the prosecution evidence inadmissible as it violated his rights under Articles 25 (c) and 50 (2) (c) and (j).

6. Regarding plea taking the appellant submitted that the charge was not read and explained to him as required and that the guidelines in ***Adan v R*** [1973] EA were not followed. He further relied on ***Henry O. Edwin v Republic*** (2015) eKLR where the court emphasizes the importance of complying with the procedure in plea taking as outlined in the ***Aden case***. He also relied on ***John Muendo Musa v Republic*** [2013] eKLR for the argument that the plea must be unequivocal. He argued that any addition in facts or lessening them would have made him changed plea.

7. On burden of proof, the appellant argued that the trial court shifted the burden of proof to him which was a subversion of justice and relied on ***Longinus Komba v R*** [1973] LRTR 7.

8. The appellant again argued that the sentence imposed on him was harsh and excessive. According to him, section 8 (2) of the Sexual Offences Act is discriminative and inconsistent with Article 27 of the Constitution and Clause 7 of the Transitional and Consequential Provisions. He asserted that the right to a fair trial is not only a fundamental right but is also inalienable and non-derogable as under Article 10 of the Universal Declaration of Human Rights and Article 25 (c) of the Constitution. He submitted that every person has a right to have their dignity protected. In his view, the trial court violated that inherent right by failing to consider his mitigating circumstances and confining itself within the prescribed law.

9. On the legality of sentence legality, the appellant argued that the trial court acted beyond its jurisdiction as envisaged under the Magistrates Act. He relied on ***Julius Amollo Oremo v Republic*** (CR. App. No. 176 of 2010).

10. The appellant further argued that the prosecution witnesses were unreliable, hostile and were compelled to testify, thus their evidence was inadmissible. He relied on ***Geoffrey Kipngeno v Republic*** (CR. APP. No. 366 of 2008). As a case in point, the appellant pointed out how PW2 lied about the age of the complainant and why she immediately packed and shifted to moved away to Makaburini.

11. The appellant submitted that the prosecution did not prove its case beyond reasonable doubt as required by law. According to the appellant, the prosecution did not prove penetration. He argued that no credible investigations were done and, therefore, the ingredient of penetration was not proved. He relied on ***Joshua Maweu Kangungu v Republic*** [2020] eKLR; (CR. APP No. 72 of 2019) and ***Amos Kinyua Kugi v Republic*** [2015] eKLR.

12. It was again the appellant's case that children can be used as pawn and that their evidence is not reliable and relied on ***JDH and GMW v Republic*** [2019] eKLR. He further argued that there were material contradiction and inconsistencies in the prosecution witnesses which required corroboration but there was not corroboration. He relied on ***John Mutua Musyoki v Republic*** [2017]; (CR. APP. No. 11 of 2016).

13. The appellant asserted that sections. 125 and 208 of the Criminal Procedure Code (CPC) were violated as he was denied an opportunity to cross-examine the alleged victim. He relied on ***John Kinyua Nathan v republic*** (CR. APP No. 52 of 2015) and sections. 125 of the CPC for the argument that no person is precluded from giving evidence except to the extent the court may determine.

14. The appellant argued that the trial court violated the *voire dire* process and section 19 (1) of the Oaths and Statutory Declaration Act as the prosecution applied for the intermediary before the *voire dire* was conducted. It failed by shifting its duty to the children's officer who

came in as an intermediary through the schemes of the prosecution. He relied on *Samuel Warui Karimi v Republic* [2016] eKLR. According to the appellant, *voire dire* which is necessary for witness of tender age was not procedurally conducted by the trial court thus the trial court denied him the right to challenge the evidence of the victim in cross-examination.

15. Regarding his alibi defence and whether it was plausible, it was his argument that an accused does not have to establish that his alibi is reasonable or true. All he has to do is create doubt on the strength of the prosecution case. He relied on *Uganda v Sebyala & others* [1969] EA 204. He also argued that his plea of not guilty still stood as his defence cast doubt on the prosecution case which was never rebutted.

16. The appellant again submitted that the charge sheet was incurably defective and that the prosecution's evidence lacked any evidential value. He maintained that the issue of age was not also proved. He relied on *Jason Akumu Yongo v Republic* [1983] eKLR and prayed that his appeal be allowed, conviction quashed and the sentence set aside.

17. The Prosecution counsel opposed the appeal through their written submissions. She supported conviction and sentence. Regarding penetration, prosecution counsel submitted that PW2 testified that the complainant told her something while pointing at her private parts and on checking her genitals they appeared injured. This was confirmed at Loitokitok hospital that the hymen had been freshly broken and there was a tear on the perineum.

18. On age, the prosecution counsel submitted that the minor's age was determined through age assessment to be 3 years and the age assessment report was dated 23rd January, 2019. It was also submitted that the appellant was known to the complainant and when the minor was asked by PW2 who had attacked her, she said it was dad. Counsel urged the court to dismiss the appeal.

19. I have considered this appeal, submission by both sides and the decisions relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it did not see the witnesses as they testified and give due allowance to that. (See *Okeno v Republic* [1972] EA 32).

20. In *Kiilu & Another v Republic* [2005] eKLR; [2005] 1 KLR 174, the Court of Appeal held that:

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

21. In *Kamau Njoroge v Republic* [1987] eKLR, the Court of Appeal again stated:

As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.

22. **PW1 Anne Kitenga**, a children's officer based at Loitokitok, testified that the minor's age assessment done on 23rd January, 2019 and confirmed that she was three years. She interviewed the minor on 9th January, 2019 but she gathered very little on what took place as she could not even say her name.

23. **PW2, MW**, mother to the minor, testified on 26th September, 2018 at 6.00 a.m. she left the appellant and his mother with the complainant at home. When she came back at 11.00 a.m. she found that the appellant's mother had gone to fetch firewood. The appellant was alone with the minor and she had changed clothes. When she inquired why, she was informed it was the appellant who had washed her. She did not bother much and went to sleep. The minor went and slapped her on the face and said pointing to her private parts; "Um daddy hapa." When she examined the minor's private parts they appeared injured. She took the minor to hospital and the doctor confirmed she had been defiled. She reported the matter at Loitokitok Police station where she was given a P3 form. Later police officers went and arrested the appellant.

24. **PW3 Ishmael Nasore**, a clinical officer based at Loitokitok Sub County Hospital, testified that the minor was taken to the facility by PW2 on 26th September 2018. He conducted age assessment and found her to be 3 years. He filled a report to that effect on the same day (26th September, 2018). He also received a report that the minor had trouble walking and going for short call. Her clothes had also been changed. She was generally well but irritable. On examination, she was in pain. Her external genitalia were normal but the hymen was freshly broken with a small tear on the perineum. She had clear vaginal discharge. He was of the opinion that she had been defiled. He assessed the degree of the injury as grievous harm and the approximate age of the injuries was 6 hours. He filled a P3 form. He produced the P3 form, PRC, lab test results and age assessment report as PEX 1, 2, 3 and 4 respectively.

25. **PW4 NO. 100745 Nancy Hussein** of Loitokitok Police station, testified that on 26th September, 2018, she arrived at work at 7.00 a.m. and found that she had been allocated a defilement case to investigate. The appellant had been arrested and was in custody. At around 8.00 a.m., the minor was taken to the station by PW2. She together with corporal Mwango and P.C. Chege took the appellant and the minor to Loitokitok Sub County hospital. A P3 form had been issued at the police station. Both the victim and the appellant were examined. She received P3 form, PRC report and lab results from CPL Esther. The minor was in pain and crying when she was taken to the station. The P3 form indicated that the minor was one year and six months old but age assessment was conducted the minor was found to be three years. The appellant had been arrested by CPL Esther, CPL Kendagor and P.C Kahindi.

26. **PW5 No. 72299 PC Kahindi Jackson Wanji** also attached to Loitokitok police station, testified that on 26th September, 2018, he was at the station when PW2 went to the station accompanied with the minor and reported that the child had been defiled by the stepfather. He accompanied the PW2 and the minor to their home in the company of CPL Esther and the station driver. They did not find the appellant at home. They later found him at Loitokitok Sub County Hospital where he was identified by PW2. They arrested him and he was later charged him with defilement.
27. The appellant gave unsworn testimony and did not call a witness. He testified that on 26th September, 2018 he went to the farm at 6.00 a.m. and came back at 5.00 p.m. He later went to withdraw money from an MPESA to buy household items. At about 9.30 p.m., on his way home, he met police officers who arrested him and took him to Loitokitok police station. The following day he was taken to hospital and later to court and charged with defilement. He denied committing the offence.
28. After considering the evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and convicted the appellant prompting this appeal. The appellant has faulted the trial court on several grounds in his grounds of appeal. Although they were not elegantly drafted, the gist of his appeal is that he was not properly identified as the perpetrator of the crime; that prosecution witnesses were not credible and that the trial court rejected his defence without assigning reasons for doing so.
29. In a case of defilement, the prosecution has a duty to prove three key ingredients beyond reasonable doubt. These are; age of the victim, penetration and identity of the perpetrator of the crime.
30. In the present appeal, the appellant was charged with defilement of a child aged one and seven months but age assessment showed that she was three years old. The evidence of PW1, a children's officer was that on 9th January 2019 she interviewed the minor but she could not gather much on what had happened. The minor could not even say her name. Age assessment conducted on the minor confirmed that she was three (3) years old. PW3 the clinical officer testified that he assessed the minor's age and found her to be 3 years old. He filled a report dated 26th September, 2018 to that effect. From this evidence, there was no doubt that the victim was a child as defined in section 2 of the sexual offences Act and the Children's Act. The ingredient of age was therefore proved as required by law.
31. The prosecution was also required to prove penetration. Penetration is defined in section 2 of the Act as partial or complete insertion of one's private organ into another person's private organ. Penetration is proved if there is either partial or complete insertion.
32. PW2, mother to the minor testified she left home on 26th September, 2018 morning and when she returned at about 11.00 a.m. she found the minor had changed clothes. The child later said something pointing to her private parts. When she examined her, the private parts appeared injured. She took the minor to hospital where examination confirmed that she had been defiled. A P3 form was issued and filled.
33. PW3 the clinical officer stated that when he examined the minor, she was in pain, her external genitalia were normal but the hymen was freshly broken with a small tear on the perineum. She also had clear vaginal discharge. He concluded that she had been defiled and signed a P3 form for her.
34. It is clear from the evidence of PW2 and PW3 that the minor had been defiled. I have also perused the P3 form dated 26th September 2018 which confirmed the injuries, In that regard, the prosecution proved the ingredient of penetration to the standard required by law.
35. The last and most critical ingredient is that of the perpetrator of the offence. The prosecution case was that it was the appellant who committed the offence. On this ingredient, the trial court considered the evidence and stated that from the evidence on record the appellant was undoubtedly the perpetrator of the offence. The trial court's conclusion was based on the sole evidence of PW2, the victim's mother.
36. PW2 had told the court that she left the minor at home to take her other children to school and thereafter went to work. when she came back at 11 am, the child had changed cloths. She inquired and she was told that it was the appellant who had changed the minor's cloths. The appellant's mother who she had left at home with the appellant had gone to fetch firewood. Later that evening, the child murmured something to the effect that "mum baba hapa" pointing at her private parts. That was when she checked on her and noticed some injuries. She took the child to hospital and she was found to have been defiled.
37. In his defence, the appellant told the trial court that on the material day, 26th September 2018, he went to the farm at 6am and came back at 5pm. He later went to an Mpesa shop to withdraw money to buy household items. As he went home at about 9.30 pm, he met police officers who arrested him. He was later charged with the offence. The appellant stated that on the day he was arrested, his wife (PW2) hired a pick up vehicle, took away all his belongings and moved to a place known as Makaburini.
38. The question that arises for determination in this appeal, is whether the prosecution evidence proved beyond reasonable doubt that the appellant was the perpetrator of the crime.
39. The law is clear that the prosecution bears the burden to prove its case against an accused beyond reasonable doubt. In ***Philip Nzaka Watu v Republic*** [2006] eKLR, the court held that that to find conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt.
40. PW2's evidence was that she left home at 6am and left the appellant, her mother in law and the minor at home. When she returned at 11am she found the minor had been defiled and changed her cloths. According to PW1, the appellant told her that he was the one who had changed the minor's cloths. On the other hand, the appellant stated that he also left home at 6am and returned at 5pm. He then went to the shop and was arrested at 9.30pm as he returned home.
41. The prosecution case hinged on the evidence of PW2 while that of the appellant hinged on his own evidence. Both PW2 and the appellant stated that they left home at 6am. Whereas PW2 returned at 11 am, the appellant did not return until 5pm. The appellant's case

therefore was that he was not at home the whole day, including when the minor was said to have been defiled. The only evidence on record on who defiled the minor was that of PW2. The trial court stated with regard to the appellant's defence that he had stated that he left home at 6am and returned at 5pm, but **"he did not vehemently deny committing the offence."**

42. The trial court did not state that the appellant's defence that he went to the farm at 6am and returned at 5pm was false or unbelievable. It did not also state why, if at all, it could not believe the appellant's defence but believed that of PW2. There was no evidence on who else was at home with the minor given that the appellant and PW2 both stated that they left home and went to attend to their errands. PW2 stated that she had also left the appellant's mother at home but she was not at home when she came back at 11am. It was not possible that the minor could have been left alone at home.

43. In a criminal trial, the prosecution has a legal duty to prove its case against an accused person beyond reasonable doubt; and as a trial court should only convict where satisfied that there is evidence on record establishing the guilt of the accused beyond reasonable doubt. It must also be clear that at the end of a criminal trial, there should be no doubt in the mind of the trial court that the accused committed the offence he is charged with. That is; there should never be presumption in a criminal trial about the guilt of the accused. The prosecution evidence must prove beyond reasonable doubt that the accused is guilty of the offence he is charged with because proof beyond reasonable doubt does not admit of plausible possibilities.

44. In **Bakare v State** (1987) 1 NWLR (PT 52) 579), the Supreme Court of Nigeria stated:

Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability. (emphasis).

45. It is also because of the high degree of proof required in criminal trials that the Court of Appeal stated in **Pius Arap Maina v Republic** [2013] EKLK, that, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be resolved in favour of the accused.

46. And in **Stephen Nguli Mulili v Republic** [2014] eKLR, the Court of Appeal again stated:

[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.

47. The prosecution relied on evidence that was not conclusive that the appellant committed the offence he was charged with. The trial court fell into error when it believed that evidence without critically examining it. The appellant clearly stated in his defence that he also left home at 6am and did not return until 5pm but the trial court did not give reasons why it could not believe him but chose to believe PW2 that it was the appellant who defiled the minor ostensibly because the minor, a three (3) year old had said to her **"Mum baba hapa."** To a three-year-old, anyone can be "baba." and it can mean anything. Furthermore, it is even clear from the evidence of PW1 that when she tried to talk to the minor, she could not gather much on what had taken place because the minor could not even say her name. The minor's word, could not be believed and could not be the basis of a sound conviction.

48. The appellant also stated that he was arrested at 9.30 as he went home, a fact that was confirmed by PW5 that they went to look for the appellant at home at 9.30 but did not find him. They later found him at Loitokitok hospital and arrested him.

49. It is clear that the prosecution had no direct evidence against the appellant to support his conviction. At best, the evidence placed before the trial court would have only passed as circumstantial evidence. Even then, the law is clear that circumstantial evidence, however strong, cannot be the basis of a conviction. The Court of Appeal pronounced itself on the law regarding circumstantial evidence in **Sawe v Republic** [2003] eKLR thus:

The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove its case against the accused beyond any reasonable doubt. As this Court has made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal NO 17 of 1998), (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

50. Having considered the totality of this appeal, reanalyzed the evidence on record and reassessed it myself, I am satisfied that the appellant's appeal has merit. Consequently, this appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 9th day of July 2021.

E. C MWITA

JUDGE